No. 05-998

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

JUAN RESENDIZ-PONCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN SUPPORT OF CERTIORARI

Atmore Baggot, Esq.
An Attorney Appointed Under the Criminal Justice Act
(18 U.S.C. § 3006A)
1615 N. Delaware Drive
Apache Junction, Arizona 85220-1804
(480) 983-9394

QUESTIONS PRESENTED

1. Whether the indictment's failure to state essential facts constituting the necessary overt act, coupled with an incorrect explanation of the nature of the charge, deprives the court of the "structure" necessary for harmless error review.

2. Whether, if harmless error analysis is required, review of preserved error should be reviewed in the same manner as unpreserved error.

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LEGAL ARGUMENT

1. Synopsis Of the Case Below:

Respondent was charged with Attempted Reentry After Deportation in violation of 8 U.S.C § 1326(b)(2). The indictment (Appdx "1") alleged neither an overt act nor any "essential facts" which could constitute such overt act. A necessary element of the offense of attempt is an overt act in furtherance of an intention to reenter the United States after having been deported. As stated in the En Banc decision in United States v. Gracidias-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000): "we hold the elements of the crime of attempted illegal reentry into the United States under 8 U.S.C. § 1326 are: ... (2) that the defendant committed an overt act that was a substantial step toward reentering without consent". (Emphasis supplied).

In accordance with Rule 51(b), and as both authorized and required by Rule 12(b)(3)(B), respondent preserved the claimed error by a timely and proper pretrial motion. He alleged the defect in the indictment and argued that the government had not provided notice of the nature and contents of its allegation.

The government responded that in its view it had complied with Rule 7(c)(1) and stated that: "the overt act of an attempt... is the entry itself". No further information was provided. (Appdx "2").

The Court Of Appeals ruled the overt act "obviously cannot be identified with the ultimate legal question of guilt or innocence". It also rejected the government's claim that the charge of attempt necessarily implied an actual entry. (p.4a of Appdx (A) following Pet For Cert, Resendiz, 425 F.3d at 732). It further alluded to various possible overt acts which the government could have charged but did not charge; namely, "the physical crossing of the border", "the bogus identification card", "lying to an inspection officer".

The Solicitor does not dispute the necessity of an overt act and does not dispute that it was not in the indictment. (See Footnote 3 on page 9 of Pet For Cert). The sole dispute is the appropriate remedy.

2. Legal Argument:

The rule which governs the "Nature and Contents" of an indictment is Rule 7(c)(1) of the Federal Rules Of Criminal Procedure. Neither the government nor the circuit judges dissenting from denial of En Banc review in United States v. Omer, 429 F.3d 835 (9th cir. 2005), have addressed the applicable rule. However, it provides:

> **(c) Nature and Contents.**
> **(1) In General.** The indictment or information must be a plain, concise and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government.
> (Emphasis supplied).

Rule 7(c) represents an embodiment of the constitutional requirement that all essential elements of an offense must be formally charged. United States v. Russell, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). And, in United States v. Hamling, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) this Court ruled:

> ... the language of the statute ... must be accompanied by such statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.
> (Internal quotes omitted).
> (94 S.Ct. at 2908).

As far back as 1927, this Court stated the constitutional rule to be that a valid indictment: "shall advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for trial, and after judgment, be able to plead the record and judgment in bar of a further prosecution for the same

offense". Wong Tai v. United States, 273 U.S. 77, 80-81, 47 S.Ct. 300, 301, 71 L.Ed. 545, 547 (1927).

The rules make a distinction between error which is preserved (Rule 51(b) – Preserving Claimed Error) and error raised for the first time on appeal (Rule 52(b) – Plain Error). The Solicitor seeks to eliminate this distinction and treat all errors alike whether preserved or not, under Rule 52(a) – Harmless Error. Six Circuit Judges are of the same viewpoint as stated sub nom United States v. Omer, 429 F.3d 835 (9th cir. 2005)("That a defendant brings a timely objection, standing alone, cannot be sufficient to create an exemption from the general rule that errors having no effect on the outcome of a proceeding must be disregarded. See Fed.R. Crim.P. 52(a)." Thus, only errors which are "structural" would be exempt from harmless error review regardless of whether or not the error had been preserved. The remaining members of the Ninth Circuit, presumably, are of the opinion that the distinction between preserved and unpreserved error should be continued. That difference of opinion is the essence of the complained-about decision in United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999)(constitutional error not subject to harmless error analysis "if properly challenged prior to trial").

The government's position conflicts with this Court's ruling in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (9th Cr. 1985). There, this

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Court spoke against "unwarranted extension" of Rule 52(b) plain error and spoke of:

> ... the Rule's "careful balancing of our need to encourage trial participant's to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed" (quoting United States v. Frady, 456 U.S. at 162, 102 S.Ct. at 1592). Reviewing courts are not to use the plain error doctrine to consider trial errors not meriting review absent timely objection. (105 S.Ct. at 1046).

The second issue presented is whether the total omission of any essential facts in violation of Rule 7(c)(1) is "structural" or whether it should be reviewed under harmless error standards. The unique feature of this case is that the government not only violated Rule 7(c)(1) but also provided misinformation as to the nature of its allegation. It stated: "the overt act of an attempted reentry is the entry itself". (Resendiz at 732). It was not until the Court Of Appeals issued its ruling that this information was eliminated as a "non-starter" in that it coincides "with the ultimate legal question of guilt or innocence". (Id.).

Respondent submits that trial on a charge that is not made, or is misrepresented, is the type of error that is "fundamentally unfair" and which "infects the framework within which the trial proceeds". (Neder, 119 S.Ct. at 1833). It is the charge that frames the issues to be decided at trial. A defendant's right to be tried only a charge presented by a grand jury and to be accurately

informed of the nature of the allegation are rights that should be classified as "substantial". (U.S. Constitution, Amdt VI).

Ordinary error is often referenced as "trial error". That phrase refers to something that happens at a trial – such as a jury instruction that omits an element as in Neder. At a trial a record is made which is reviewable. The context and therefore the significance of the error can be compared with everything else. Here, however, the government still has not provided information as to what discrete act this court should consider as having been the overt act that resulted in conviction. Granted that respondent did "something". But, there is no assurance that the "something" was in furtherance of the intended attempt to illegally reenter. If the overt act was, for instance, "lying to an inspection officer" respondent may have been attempting to extricate himself because he instantly aroused suspicion and was being referred to secondary inspection. If the overt act was ""tendering of the bogus identification card" respondent may have explained that the documents were valid and he wished to inquire if they could be used for his entry. On the other hand, there are "a number of other acts that the government might have alleged as a substantial step toward entry into the United States". (Resendiz at 733).

Conjecture as to what the overt act might have been, as to respondent's explanation, and as to the uncertainty of how a jury would have resolved the unpresented matters place this case under Sullivan v. Louisiana, 508 U.S. 275, 113

S.Ct. 2078, 124 L.Ed.2d 182 (1993) concerning a constitutionally deficient instruction on reasonable doubt. There, the Court ruled the error to be structural due to the uncertainty of how the jury would have reacted under a proper reasonable doubt instruction. The Court refused to engage in speculation outside of the record as to whether "a jury *would surely have found* petitioner guilty beyond a reasonable doubt" (113 S.Ct. at 2082) and focused inquiry on "whether the guilty verdict actually rendered in *this* trial was surely attributable to the error". (Id.2081).

Here, the government's argument, basically, is that surely Resendiz did something to carry out his intention to illegally reenter the United States albeit that "something" has never been identified. The government's argument asks the Court to engage in off-the-record speculation that amounts to the same type of "directed verdict for the State" that is constitutionally condemned in Sullivan. Here, as in Sullivan, there is no record to review. The error must be deemed to be structural because it is not amenable to quantitative analysis. The misdescription of the burden of proof in Sullivan results in the same type of pure speculation as does the misdescription of the charge in the present case. True, the record contains any number of acts which might have been the necessary overt act – but none have been identified as such. Without knowing what act the government claims is the

overt act there is no structural framework under which the harmlessness of the error could be reviewed.

Finally, the Solicitor insinuates that the admitted error in this case is: "an element of the offense ... inadvertently omitted from a federal indictment, whether because of prosecutorial oversight or simply because of uncertainty as to what constitutes an offense element". (Cert. Pet, p.17). Here, there is nothing uncertain about the overt act being an element. (See, Gracidias, supra). And, there is nothing uncertain about the requirements of Rule 7(c) since the government was provided a timely and appropriate motion detailing its omission of "essential facts" from the indictment. Respondent presents this observation in accordance with Supreme Court Rule 15(2).

CONCLUSION

In conclusion, this court should grant certiorari and rule: (1) that the distinction between preserved error and plain error is sound; and, (2) that this case lacks the structure and framework necessary for harmless error review.

DATED: March 6, 2006.

Respectfully submitted,

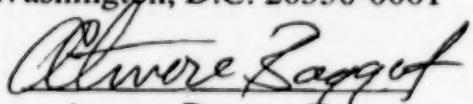
Atmore Baggot

Atmore Baggot, Esq.
CJA Counsel Of Record For Respondent

CERTIFICATE OF SERVICE

I hereby certify that on or prior to Monday, March 6, 2006, I placed two (2) copies of this Respondent's Brief In support Of Certiorari in the United States mail, postage prepaid,

Solicitor General Of the United States
ATTN: Michael A. Rotker, Esq.
Room 5614, Department Of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001



Atmore Baggot, Esq.

APPENDIX "1"

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CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Juan Resendiz-Ponce,
aka: Juan Ponce Resendiz,

Defendant.

NO. CR03-810-PHX EHC

INDICTMENT

VIO: 8 U.S.C. §§ 1326(a) and enhanced by (b)(2)

(Attempted Reentry After Deportation)

THE GRAND JURY CHARGES:

On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

In violation of Title 8, United States Code, Sections 1326(a) and enhanced by (b)(2).

A TRUE BILL

John T. Ziglin

FOREPERSON OF THE GRAND JURY
Date: July 30, 2003

PAUL K. CHARLTON
United States Attorney
District of Arizona

Lisa J. Getter for

MARY BETH PHILLIPS
Assistant U.S. Attorney

APPENDIX "2"

PAUL K. CHARLTON
United States Attorney
District of Arizona

Raynette M. Logan
Assistant U.S. Attorney
Arizona Bar #016695
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Juan Resendiz-Ponce,
aka; Juan Ponce Resendiz

Defendant.

No.CR 03-810-PHX-EHC

GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT

The United States of America, by and through undersigned counsel, hereby responds to defendant's motion to dismiss the indictment. In support of this response, the government provides the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

An indictment must allege the elements of the offense charged and the facts which inform the defendant of the specific offense with which he is charged. Pernillo-Fuentes, 252 F.3d 1030, 1031 (9th Cir. 2001). In construing the language of the indictment courts must be guided by common sense and practicality. United States v. Christopher, 700 F.2d 1253 (9th Cir. 1983). Attempted entry in violation of 8 U.S.C. 1326 essentially requires two elements: (1) the specific intent to reenter without consent; and (2) an overt act that was a substantial step towards reentry. United States v. Leos-Maldonado, 302 F.3d 1061, 1063 (9th Cir. 2002).

The defendant relies on United States v. Gracidias-Ulibarry in his argument that the indictment failed to allege specific intent since it stated that he "knowingly and intentionally" attempted to enter the United States, 231 F.3d 1188, 1196 (9th Cir. 2000). In Gracidias-Ulibarry, the Court found constitutional error when the district court failed to instruct the jury on the specific intent element of reentry. Id. at 1198. There, the trial court instructed the jury that it should convict Gracidias if it merely found that he "attempted to reenter the United States" instead of finding that he "intended" to enter the United States. Id. at 1191. The defendant also relies on Pernillo-Fuentes which held that an indictment that alleged only that the defendant "attempted to enter the United States" was fatally flawed. 252 F.3d at 1032. The facts of these cases are distinguishable from the instant case. Here, in contrast to mere attempt, the indictment alleges that the defendant "knowingly and intentionally" attempted to enter the United States.

Furthermore the indictment does allege the specific intent required in Gracidias-Ulibarry. The terms knowingly and intentionally constitute willfulness. United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997). "Willful" in the criminal context includes a specific intent to do an act forbidden by law. United States. v. Drew, 722 F.2d 551(9th Cir. 1983). In this case, the indictment states that the defendant "knowingly and intentionally" attempted to enter the United States and thus specific intent is alleged.

The defendant also alleges that the indictment failed to allege an overt act. Attempted reentry is not an attempt to commit an independently described offense, in the sense in which the word "attempt" is ordinarily used in criminal law, but it is the actual reentry into the United States. United States. v. Corrales-Beltran, 192 F.3d 1311, 1319 (9th Cir. 1999). Attempted entry occurs when a previously deported alien makes an effort or tries to reenter the United States. United States v. Leos-Maldonado, 302 F.3d 1061, 1064 (9th Cir. 2002). It is the act of crossing the boundary line into the United States. Id. In this case, the indictment alleges that the defendant attempted to enter the United States at or near San Luis, Arizona on or about October 15, 2002. Since the overt act of an attempted entry crime is the entry itself and the indictment stated the date and place of the defendant's reentry, the indictment sufficiently alleges an overt act.

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Conclusion

For the foregoing reasons the defendants motion to dismiss the indictment should be denied.

Respectfully submitted this 17th day of November, 2003.

PAUL K. CHARLTON
United States Attorney
District of Arizona

RAYNETTE M. LOGAN
Assistant U.S. Attorney

Original filed and copy of the foregoing mailed this 17th day of November 2003, to:

Atmore L. Baggot
1615 N. Delaware Drive
Apache Junction, Arizona 85220-1804